Commonwealth of Massachusetts
Energy Facilities Siting Board

Promulgation of Rules Governing Siting of Natural Gas Pipelines and Participation in Federal Siting Proceedings, and Repeal of Certain Existing Siting Board Rules	)	EFSB 02-RM-2

Comments of
Duke Energy Gas Transmission Corporation and
Maritimes & Northeast Pipeline, L.L.C.
on Proposed Rules

In response to the Final Order Opening Rulemaking ("Order") of the Energy Facilities Siting Board ("EFSB") in the above-entitled matter, Duke Energy Gas Transmission Corporation ("DEGT"), a Delaware Corporation, and Maritimes & Northeast Pipeline, L.L.C. ("Maritimes"), a Delaware limited liability company, respectfully submit the following comments in respect to the proposed regulations governing the review and permitting of natural gas pipeline projects constructed in Massachusetts.

Specifically, the EFSB proposes to adopt 980 C.M.R. § 15.00 et seq. ("Section 15"), which would explicitly extend its jurisdiction to gas pipeline facilities proposed by interstate pipeline companies, large gas customers or other market participants, even in cases where the proposed facilities are within the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). The EFSB is also proposing to adopt 980 C.M.R. § 17.00 et seq. ("Section 17"), which sets forth the procedures that the EFSB would follow to participate in a FERC proceeding where an interstate pipeline company operating within the Commonwealth is proposing to build a natural gas pipeline, or other natural gas facility, that falls under FERC jurisdiction. The major provisions of the proposed regulations (Section 15 and Section 17) are summarized below.

By statute, the EFSB has jurisdiction over the construction of natural gas pipelines "intended to have normal operating pressure in excess of 100 pounds per square inch gauge ("psig") and length in excess of one mile." G.L. c. 164, § 69G. In that regard, Section 15 seeks to clarify the EFSB's jurisdiction over the construction of natural gas pipeline facilities in four areas. For example, Section 15 would assert EFSB jurisdiction over the construction of all natural gas pipelines that are regulated by FERC, but are not subject to a "full project-specific" review to obtain a § 7(c) Certificate of

Public Convenience and Necessity ("§ 7(c) CPCN") under the Natural Gas Act (the "NGA").[1]

In the event that an interstate pipeline company is planning to construct a facility that will not be subject to a "full project-specific" review by FERC, Section 15 identifies the required elements of an application to construct a jurisdictional gas pipeline. These requirements include the submittal of a detailed petition covering such topics as the need for the facility, environmental impacts, alternative approaches and routes, economic analyses, and the effect of the project on the reliability of the gas-supply system.

Section 17 seeks to clarify the EFSB's current regulations governing its procedures for participating in FERC proceedings where an interstate pipeline company operating within the Commonwealth is proposing to build a natural gas pipeline, or other natural gas facility, that falls under FERC jurisdiction. The EFSB's current regulations state that, if a pipeline is regulated by FERC pursuant to the NGA, the EFSB shall intervene in the federal proceeding, hold one or more public hearings, require joint adjudicatory hearings with FERC, and submit comments on the proposal. Section 17 as proposed sets forth differing procedures for EFSB participation in: (1) a FERC § 7(c) CPCN proceeding, which includes a review of project need, alternatives and environmental impacts; (2) a FERC § 7(c) Blanket Certificate proceeding, which includes an abbreviated comment process when projects are reviewed under FERC's 45-day blanket certificate process (for pipelines with costs between $7.4 and $20.6 million); and (3) other FERC proceedings. As proposed, Section 17 would apply to all construction that does not meet the size and pressure thresholds established in G.L. c. 164, § 69H.[2]

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[1] The EFSB essentially defines this to be pipeline projects that will cost more than $20.6 million to construct, based on its understanding that FERC will grant a § 7(c) blanket certificate for projects costing between $7.4 and $20.6 million (following a 45-day notice period) and that FERC requires no advanced notice or process for projects costing less than $7.4 million.

[2] The EFSB seeks comments addressing any or all provisions of the Rulemaking and also seeks responses to certain questions relating to: (1) the extension of EFSB jurisdiction to pipeline projects that are also subject to FERC jurisdiction; (2) the extension of EFSB jurisdiction to "Direct Sales Laterals," or lateral pipelines that are constructed by interstate pipeline companies and directly serve end-users; (3) the extension of EFSB jurisdiction to "any other facilities" that would be fully reviewed by FERC, only if they are not reviewed by the state (e.g., Hinshaw pipeline facilities); (4) the filing requirements that a petitioner must fulfill under Section 15, if a

1. DEGT, Maritimes and their Affiliates.

DEGT owns and operates several thousand miles of interstate natural gas transmission systems located in the United States through its pipeline company subsidiaries. These systems are owned by Algonquin Gas Transmission Company ("Algonquin"), a Delaware corporation with an office in Boston, Massachusetts, Texas Eastern Transmission, LP, a Delaware limited partnership, and East Tennessee Gas Transmission, LP, a Delaware limited partnership. Algonquin is a natural gas company as defined under 15 U.S.C. § 717 *et seq*. that owns and operates an interstate natural gas transportation pipeline system, a significant portion of which is located in Massachusetts.

Subsidiaries of DEGT own a seventy-five (75%) percent interest in Maritimes. M&N Management Company, a Delaware corporation, is a wholly owned subsidiary of DEGT and is the Managing Member for Maritimes. Maritimes also has an office in Boston, Massachusetts and is a natural gas company under the NGA. The Maritimes' system is an interstate natural gas transportation pipeline system extending from an interconnection with its Canadian affiliate's transmission pipeline at the Canadian border near Calais, Maine through Maine and New Hampshire to Dracut, Massachusetts. The portion of Maritimes' interstate pipeline from Westbrook, Maine to Dracut, Massachusetts is jointly owned with Portland Natural Gas Transmission System, a Maine general partnership that is also a natural gas company. Algonquin's system is also connected to a number of other interstate pipelines that transport gas from the natural gas fields in the United States and Canada.

Shortly the Algonquin HubLine Project is expected to connect with the Phase III Project of Maritimes' interstate pipeline system in Beverly, Massachusetts. The

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pipeline is jurisdictional; (5) the extent to which the new regulations would change the number or type of gas pipeline petitions submitted to the EFSB for review; (6) the proposed provisions relating to the five-year time period to encompass contiguous pipeline construction activities, the definition of "normal operating pressure" and the replacement of pipeline; (7) the EFSB's distinction between a "route alternative," which is required for comparison purposes, and a "route

Maritimes Phase III Project is approximately 25 miles of 30-inch diameter pipeline that will extend Maritimes' interstate pipeline system from Methuen to Beverly, Massachusetts. Algonquin's HubLine Project is approximately 29 miles of 30-inch diameter pipeline that will run off-shore from the connection with Maritimes' interstate system in Beverly to a connection with Algonquin's existing interstate system in Weymouth, Massachusetts. The HubLine and Phase III Projects have been authorized by certificates of public convenience and necessity issued by FERC under NGA § 7(c), 15 U.S.C. § 717f(c) ("FERC certificate") and are currently under construction.

Algonquin and Maritimes are transporters of natural gas in interstate commerce under various FERC certificates pursuant to § 7 (c) of the NGA. Algonquin has operated its interstate pipeline system in Massachusetts since 1952. Maritimes has done so since 1999. Algonquin and Maritimes have no sale for resale customers and neither Algonquin nor Maritimes own or operate Hinshaw pipelines, subject to the regulatory control of the states pursuant to § 1(c) of the NGA.

2. DEGT and Maritimes' Comments on the Jurisdiction of the EFSB.

The regulations proposed in the Order are intended to supersede regulations initially promulgated by the Massachusetts Energy Facilities Siting Council ("EFSC"), the predecessor of the EFSB, regarding the siting of energy facilities in the Commonwealth. Although DEGT and Maritimes agree that streamlining and updating such regulations to deal with new or changing legal, regulatory and business conditions is a worthy goal, that goal must be consistent with federal and state law.

In addition, the potential economic disincentive to new investment in the interstate gas pipeline infrastructure within the Commonwealth from the regulations as proposed must be carefully considered. The existing regulatory review, wherein the EFSB has maintained an active and valuable participatory role, has ensured that the interests of the Commonwealth and its citizens are fully and adequately represented. The EFSB's participation has also been supplemented by the Commonwealth's

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variation," which is an alternative to a short segment of a pipeline route where specific uncertainties affect the feasibility of that route segment; and (8) filing fees for non-utilities.

environmental agencies at both the state and local levels within the context of the FERC process. However, putting aside the issue of the legal under-pinning of the EFSB proposed regulations the EFSB's initiative will not add anything to the existing comprehensive review and, therefore, can only serve to discourage future investment by blurring the regulatory responsibilities of federal and state government. By creating regulatory uncertainty, the EFSB's regulations could serve unwittingly to jeopardize a continuation of the level of financial investment experienced over the past ten years as the Commonwealth faces its energy future in these difficult economic times.

DEGT and Maritimes believe that the regulations proposed in the Order that attempt to assert EFSB jurisdiction over the facilities of interstate natural gas companies, such as Algonquin and Maritimes, are contrary to the intention of Congress in connection with the regulation of interstate pipelines. Such pipelines are exclusively subject to the siting authority of FERC under the NGA and regulation by the United States Department of Transportation with respect to pipeline safety pursuant to 49 U.S.C. § 60,001 *et seq*. Accordingly, based on the history of the existing EFSB regulations and the federal case law discussion that follows, DEGT and Maritimes believe that the EFSB cannot exercise jurisdiction over the construction and operation of FERC-regulated interstate natural gas pipeline facilities.

3. Historical Background of Interstate Natural Gas Company Facilities under the EFSC Regulations.

The EFSC was established as a result of legislation enacted by the General Court in the early 1970s that is now codified in M. G. L. c. 164. The EFSC's enabling legislation was the product of meetings between consumer and environmental interests who felt that they did not always have adequate advance notice of proposed utility projects, and local distribution companies ("LDCs") who wished to receive environmental and other comments on their proposed energy facilities and supply plans in unitary state regulatory proceedings.

Unlike the EFSC's regulatory jurisdiction over the siting of LDC facilities, EFSC regulation of the interstate pipelines of natural gas companies would duplicate the existing siting regulation of those facilities by FERC under the NGA. The General Court recognized this problem and, to avoid a conflict with federal law, attempted to solve it by providing in St. 1973, c. 1232, (as amended by St. 1974, c. 852, § 21) that the act governing the EFSC granted the EFSC no jurisdiction over matters that were within the exclusive jurisdiction of the federal government. This jurisdictional clarification was reaffirmed by the General Court when the EFSC was merged into the Department of Telecommunications and Energy and became the EFSB. Section 54 of Chapter 141 of the Acts of 1992 states that: "This Act shall not apply to any matter over which any agency, department or instrumentality of the federal government has exclusive jurisdiction." Hereafter this provision shall be referred to as the "State Jurisdictional Limitation."

Shortly after the EFSC was organized, Algonquin filed a rulemaking petition with the EFSC requesting a rule consistent with the State Jurisdictional Limitation exempting interstate pipelines regulated by FERC from EFSC energy facility siting jurisdiction. Algonquin's petition was denied. Algonquin appealed that denial to the Supreme Judicial Court of Massachusetts (the "SJC") pursuant to M. G. L. c. 25, § 5, and also filed a petition for a declaratory judgment with the SJC seeking a declaration that assertion of jurisdiction by the EFSC over interstate pipeline facilities regulated by FERC was invalid. Concurrently, Tennessee Gas Pipeline Company ("Tenneco") brought an action to enjoin application of the EFSC's regulations affecting its interstate pipeline facilities located in the Commonwealth in the United States District Court for the District of Massachusetts. Distrigas of Massachusetts Corporation intervened in the state and federal proceedings of Algonquin and Tenneco respectively. FERC intervened in support of Tenneco in Tenneco's action in the United States District Court. During negotiations among the parties to settle these proceedings, the EFSC agreed to clarify its regulations by expressly exempting interstate natural gas pipelines regulated by FERC from the regulatory ambit of providing energy forecasts and facility siting

(except for certain public informational filings requirements). The various judicial proceedings were dismissed. The EFSC regulations that resulted from the foregoing settlement constitute in relevant part the existing regulations that the EFSB now seeks to revise.

In the regulations as revised, the EFSC expressly recognized its extremely limited authority over natural gas companies regulated by FERC in connection with energy forecasting and with respect to energy facility siting. The regulations provided that a natural gas company file with the EFSC a copy of any application for a certificate of public convenience and necessity under § 7(c) of the NGA that the company had filed with FERC for a project that was proposed to be located in the Commonwealth. The EFSC was then required to hold public informational sessions in the affected communities, in which the interstate pipeline company participated in order to answer general informational questions with respect to the route and other issues posed by the FERC application. The EFSB was also authorized to intervene in the FERC proceeding in order to present its view of the proposed facilities and the concerns raised at the hearings.

The EFSC in its final opinion in EFSC No. 80-25 dated March 28, 1980, 3 DOMSC 167 (1980), adopting the clarified regulations, summarized its actions in the following language:

> "By taking this data [demand and sendout data] for informational purposes only and by being specific as to the extent to which the regulations apply to interstate companies (Rule 3.3), the Council avoids 'over-regulating' which would result by unnecessarily duplicating regulation at the federal level. The Council avoids overregulating further by delineating the extent of its participation on the state level in such companies' construction proposals (new Rule 67.9). By taking the action contemplated by the new regulation as to interstate facilities, the Council exercises its duty to the public by informing them early and completely of the nature and effect of these construction proposals through a local informational hearing without adding another tier of regulation that may only serve to duplicate or protract the existing federal regulation of such

> proposals. What is really achieved by the proposed regulations is an efficient and intelligent exercise of Council jurisdiction which makes use of the present regulatory scheme without unduly expanding it." 3 DOMSC at 170.

DEGT and Maritimes maintain that the EFSC's settlement of the cases discussed above conformed the current EFSB regulations on these matters to the State Jurisdictional Limitation and the federal preemption principles discussed below. There is neither legal authority nor an overriding public interest in submitting the energy facilities of natural gas companies regulated by FERC under NGA § 7 (c) to concurrent regulation by the EFSB. Under the current EFSB regulations, which have been in place for over 20 years, residents and other parties affected by an interstate gas pipeline project that is estimated to cost in excess of approximately $21 million are provided with an opportunity by the EFSB to obtain information on the proposed construction, and have their concerns represented at FERC by the EFSB. This forum is in addition to the FERC mandated landowner notification requirements.

As a matter of practice, DEGT and Maritimes have routinely briefed the EFSB and provided it with a copy of any application for a FERC NGA § 7 (c) certificate that they have filed with FERC for a site specific project that is to be located in the Commonwealth. Such meetings have occurred and such copies have been delivered prior to the time that official notice of the application appears in the Federal Register. Similarly, as the recommendations in Section 13 and Exhibit A of these Comments indicate, DEGT and Maritimes are willing to provide a copy of any Request for Authorization to construct, modify, expand or replace a gas facility that is filed with FERC pursuant to 18 CFR § 157.205 to the EFSB shortly after filing it with FERC.

The existing EFSB regulations pertaining to natural gas companies regulated by FERC have worked since 1980, and the General Court has reaffirmed the State Jurisdictional Limitation since then with full knowledge of the existing regulations and their history. For these reasons alone, DEGT and Maritimes believe that the EFSB should neither change its existing policy nor the substance of its existing regulations as

applied to interstate natural gas companies. There are also the related questions of federal preemption and preclusion that must be considered in determining whether the proposed regulations are legally enforceable.

4. Field Preemption Applies to Preempt State Regulation of Interstate Pipelines under § 7(c) of the NGA .

a. General Background of the NGA.

The NGA was originally enacted because the States were prohibited by the U.S. Supreme Court in applying the so-called dormant Commerce Clause from regulating interstate electric and gas activities. U.S.Const., art. I, sec.8, cl. 3. Cases on this subject which pre-dated the NGA include: Missouri v. Kansas Natural Gas Co., 265 U.S. 298 (1924); Public Util. Com' for Kan. v. Landon, 249 U.S 236 (1919); Pennsylvania Gas Company v. Public Serv. Com. of New York, 252 U.S. 23(1920) and Comm'n of R.I. v. Attleboro Steam & Electric Co., 273 U.S.83 (1927). These cases established what was known as the Attleboro-Gap, a field of activity in which interstate pipelines and electric companies transporting their respective products across state lines and selling that product for resale were free of state regulation. Accordingly, in the case of interstate pipelines, Congress passed the NGA, thereby granting the Federal Power Commission ("FPC") exclusive regulatory authority over natural gas companies, sales of natural gas for resale and interstate transportation of that gas. Complementary regulatory jurisdiction over natural gas sales and transportation activities outside of this field was reserved to the states. In short, the NGA codified the Attleboro-Gap and placed the FPC exclusively in charge of its regulation. See NGA § 1 (b), 15 U.S.C. § 717 (b). Subsequently, that authority was transferred to FERC.

b. Hinshaw Pipelines and Expansion of Reserved State Regulatory Authority.

Federal Power Commission v. East Ohio Gas Co., 338 U.S. 464 (1950) held that the NGA applied to all facilities used to transport natural gas across state lines, including transportation facilities of LDCs, which received deliveries of natural gas at a state border. States and others disagreeing with this decision persuaded Congress to

amend the NGA to insert a new § 1(c) in the NGA, 15 U.S.C. § 717(c), which expanded the reserved state regulatory authority to include so-called Hinshaw pipelines, provided that the conditions of NGA § 1(c) were met by the facility and the State. The NGA § 1(c) conditions require that the pipeline be situated solely within the boundaries of a single state, receive natural gas transported in interstate commerce at the state border or within the State from a legally distinct entity and that such gas be ultimately consumed within the State. Additionally, the State in question must actively regulate the pipeline. This amendment to the NGA expanded the reservation of complementary State authority over natural gas pipelines and correspondingly narrowed FPC regulatory authority under the NGA, but it did not limit the FPC's exclusive jurisdiction over the pipeline facilities of natural gas companies that transported natural gas across state lines.

c. Authority of FERC under NGA § 7 (c)

The case of Atlantic Refining Co. v. Pub. Service Commission of N.Y., 360 U.S. 378 (1959) confirmed that FPC authority to issue certificates of public convenience and necessity under NGA § 7 (c) included a comprehensive and wide-ranging consideration of factors affecting the public interest, including environmental review, gas supply, demand for gas, cost of facilities and various other matters that affect the public interest. A NGA § 7 (c) certificate is essential to the siting, construction and operation of interstate natural gas pipelines and serves as the basis for federal preemption of state regulatory activity in this field. Blanket certificate authorization is a subset of NGA § 7(c) authorization wherein FERC has recognized projects of lesser impact and has established procedures for notice and public participation. This specific certificate authority was created in order to prevent delays in constructing minor facilities to meet market needs and system reliability matters.

d. Federal Preemption Doctrines.

Preemption is a federal constitutional doctrine arising under the Supremacy Clause that has been recognized by courts to exclude State regulation of activities or

facilities that are regulated by the federal government. U.S. Const., art. VI, cl. 2. Federal preemption can be expressly enacted by statute as in the case of the Pipeline Safety Act, 49 U.S.C. § 60104(c). Preemption is implied where state or local regulation is in conflict with federal regulation (so-called conflict preemption, as in Hines v. Davidowitz, 312 U.S. 52 (1941)) or where federal regulation is so comprehensive as to occupy the field as to all relevant regulatory issues falling within that field (so-called field preemption, as in Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)).

(1) Field Preemption under the NGA.

Field preemption applies to FERC's regulation of the transportation of natural gas in interstate commerce and sales of that gas for resale. Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988). In Schneidewind, the State of Michigan enacted a statute granting its public service commission power to review and approve issuance of long term securities of natural gas companies that were subject to FERC regulation. On review of Michigan's assertion of jurisdiction over natural gas companies, the U.S. Supreme Court overturned the Michigan statute. The Court noted that the NGA was silent on regulation of security issues of natural gas companies. However, it found that the assertion of State power in this field created an imminent conflict with FERC's comprehensive regulatory authority to review and approve appropriate equity levels and rates charged by natural gas companies. Moreover, it indicated that once FERC regulates, the mere imminent possibility of conflict was enough to establish Federal preemption of laws. The Court stated:

> "When a state regulation affects the ability of FERC to regulate comprehensively…the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the [NGA] or presents the prospect of interference with the federal regulatory power, then the state law may be pre-empted even though collision between the state and federal regulation may not be an inevitable consequence…Although hypothetical conflict will not always show an intent to preempt state authority…this imminent possibility

> further demonstrates the NGA's complete occupation of the field that Act 144 seeks to regulate…" 485 U.S. at 310.
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> "The test… is whether the matter on which the State asserts the right to act is in anyway regulated by the federal Act…In the present case, Act 144 fails that test and is preempted." Id., n.13

(2) Field Preemption Applied to the Siting of Energy Facilities.

The United States Court of Appeals for the Second Circuit subsequently applied Schneidewind to an attempt by a state energy facility siting agency to regulate the environmental and other impacts of interstate natural gas pipeline construction that was regulated and approved under NGA § 7(c). National Fuel Gas Supply Corporation v. Public Service Corporation of New York., 894 F. 2d 571 (2d Cir. 1989) cert. den. 497 U.S. 1004 (1990). Under the facts of the case, New York by statute required that all persons constructing natural gas transmission facilities obtain a certificate of environmental compatibility and public need from its public utility commission. Such a certificate required a review and approval, among other things, of all siting, land use and environmental impacts of a project. On review of the validity of the New York statute, the Second Circuit struck it down. The Court found that FERC regulation of the siting, land use and environmental aspects of interstate pipeline construction were comprehensive and that the federal preemption conclusion was "facially overwhelming", involving an imminent possibility of conflict which could require delays in pipeline construction and possible fines. Hence the Schneidewind doctrine of field preemption and imminent conflict was specifically applied to an attempt by a state to regulate energy facility siting of interstate gas pipeline facilities.

Another important case involving judicial interpretation of federal law to preempt state regulation of a field of FPC and FERC energy facility siting is First Iowa Hydro-Electric Cooperative v. FPC., 328 U.S.152 (1946). There, an electric power cooperative filed an application with the FPC for a license to construct a hydroelectric facility on the Cedar and Iowa Rivers. The State of Iowa intervened and argued that, as a condition to receiving a license, the applicant must first comply with state laws

pertaining to dam siting. The FPC initially agreed, but was subsequently reversed by the U.S. Supreme Court. The Court held that the Federal Power Act ("FPA"), 16 U.S.C. § 791 *et. seq.*, created complementary (and not concurrent) fields of federal and state regulation, with the FPC having been granted an exclusive field of regulation over hydro-power projects to be situated in navigable waters. Further it found that to require an applicant for a FPC hydro-power license to construct and operate a hydro-power facility situated in navigable waters to apply for a State siting permit would be equivalent to granting the State a veto power over the interstate project and frustrating the will of Congress. The Court also indicated that the regulatory power asserted by the State of Iowa struck at the heart of the FPA.[3] See also California v. FERC , 495 U.S. 490 (1990) (reaffirming First-Iowa).

5. Collateral Attack of FERC Orders Precluded.

Another line of cases establishing primacy of FERC regulatory jurisdiction under the FPA and the NGA holds that no person, not even a State, can collaterally attack a provision in a license or order issued by FERC within the field of its authority once that license or order is final and not appealable. Under FPA § 313(a) and (b) and NGA § 19(a) and (b), any person who wishes to appeal an order issued by FERC must file a petition for rehearing with FERC asserting any errors in the FERC decision. If the petition for rehearing is denied, the appeal must be to the applicable Circuit Court of Appeals or the issue is forever lost. Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958).

Tacoma makes it clear that States may not circumvent the appellate remedies contained in the FPA and NGA by subsequently invoking state administrative or judicial procedures. In Tacoma, the Court emphasized that the United States Circuit Court of Appeals had had exclusive jurisdiction of the judicial review of the FPC proceeding and that its judgment was final, as provided by § 313 of the FPA, subject

[3] The FPA and NGA containing similar provisions and stemming from a common origin are frequently treated as in *pari materia*, so that precedents under one statute are frequently treated as precedents under the other. Arkansas Louisiana v. Hall, 453 U.S. 571 (1981).

only to review by the U.S. Supreme Court. Id., at 339. See also, Williams Natural Gas v. Oklahoma City., 890 F. 2d 255 (10th Cir. 1989) cert. den. 497 U.S. 1004 (1990) (involving NGA § 19).

DEGT and Maritimes have been issued NGA § 7 (c) blanket certificates by FERC and those orders are now final. Consequently, the EFSB and the Commonwealth are precluded from raising regulatory siting issues under EFSB regulations that would vitiate or modify those orders.

6. Additional Cases Applying the Preemption and Preclusion Doctrines.

The result of these doctrines is that state energy siting agencies may not hold adjudicatory proceedings that annul, modify or delay projects or facilities that fall within the scope of FERC jurisdiction. State and federal courts invariably apply these doctrines to invalidate local or state regulatory efforts to interfere with the siting of FERC regulated interstate facilities and projects. See, e.g., Kern River Gas Transmission Company v. Clark County, 757 F. Supp. 1110 (Nev. 1989) (local construction permits and franchise requirements), Skyview Acres Cooperative, Inc. v. Public Service Commission, 558 N.Y.S. 2d 972 (N.Y. App. Div. 2d Dept.1990) (state review of pipeline routes and facility location), Schmoeger v. Algonquin Gas Transmission Company, 802 F.Supp.1084 (S.D.N.Y. 1989) (nuisance action), Columbia Gas Transmission Corporation v. an Exclusive Natural Gas Storage Easement, 747 F.Supp. 401 (N.D. Ohio) (common law trespass), USG Pipeline Co. v. 1.74 Acres, 1 F.Supp. 2d 816 (E.D. Tenn, 1998) (state law prohibiting takings in public ways), Tennessee Gas Pipeline Co. v. Massachusetts Bay Transportation Authority, 2 F.Supp. 2d 49 (D. Mass. 1998) (state law prohibiting takings within the bounds of railway locations) and Algonquin LNG v. Ramzi Loqa, 79 F. Supp. 2d 49 (D.R.I. 2000) (field preemption analysis used to invalidate application of city zoning and building codes to FERC-certificated facilities to be constructed at the site of a FERC-certificated liquefied natural gas facility).

7. The EFSB is Preempted and Precluded from Collateral Attack or Review of Facilities That Are Subject to NGA § 7 (c) Blanket Certificates Issued by FERC.

Pages 5 and 6 of the EFSB's Order express concern that interstate pipelines subject to FERC blanket certificate regulations are being constructed without being subjected to the same level of governmental review to which Massachusetts LDCs and other developers of energy facilities are now subject to in the Commonwealth. The proposed rules would thus treat so-called NGA § 7 (c) blanket certificates issued by FERC differently from site specific FERC NGA § 7 (c) proceedings. In that type of proceeding, a natural gas company files an application with FERC for a certificate of public convenience and necessity which is individually and specifically tailored to a proposed project under 18 C.F.R. Parts 157 and 380. In its Order, the EFSB specifically concedes that an assertion of jurisdiction in this area may be vulnerable to legal challenge and seeks comment on alternative ways to deal with facilities of FERC regulated natural gas companies.

On the basis of the history of the existing EFSB regulations and the case law that has been cited above, DEGT and Maritimes maintain that the EFSB cannot conduct more than public informational hearings in connection with the siting of FERC regulated facilities that require the filing of an application for a site specific Certificate as stated in its current regulations. Moreover, hearings that are not expressly authorized by FERC regulations in connection with facilities that are subject to an NGA § 7(c) blanket certificate are unauthorized and clearly preempted.

FERC Regulation 18 C.F.R. § 157.204 (a) generally provides that a natural gas company that has been issued a Certificate (other than a limited certificate) and has had its rates accepted by FERC may apply for a blanket certificate. In addition 18 C.F.R §§ 157.205 and Sec. 157.208(b) taken together provide that, even after issuance of a blanket certificate, no construction activities having a cost below a certain maximum (currently approximately $21 million) and above a certain minimum (currently approximately $7.5

million)[4], hereafter called a “Blanket Prior Notice Certificate”, shall be authorized unless notice thereof has been published in the Federal Register and either: (i) no protest is filed with FERC pursuant to FERC regulations, or (ii) if a protest is filed, it is withdrawn. Such a protest may be filed pursuant to 18 C.F.R. § 157.205(e) by "any person or the Commission's staff.” Notice to the public and affected landowners for the proposed blanket certificate activity is set forth in 18 C.F.R. § 157.203(c) and (d). These provisions on their face include the EFSB. After a protest is filed, there is a period of 45 days to resolve any legitimate issues, and if such issues cannot be resolved within that period, the proceeding is treated as a case in which an application for a site-specific Certificate has been filed with FERC. Consequently, the EFSB has ample opportunity in such situations to raise legitimate siting concerns that it may have. The EFSB has this federal right without the necessity of modifying its current regulations. In any event, it is clear from the cases cited and discussed above, that FERC has preemptive authority with respect to Blanket Prior Notice Certificates, and the EFSB is foreclosed from any regulation in that field.

There is another class of interstate projects regulated by FERC under its NGA § 7(c) blanket certificate regulations in which no protests may be filed. These are projects that involve a cost of facilities that is less than the Blanket Prior Notice Certificate projects discussed above. FERC Regulation 18 C.F.R. § 157.208 provides that the issuance of a blanket certificate in this situation grants a natural gas company an automatic right to: "(1) make miscellaneous rearrangements of any facility, or (2) acquire, construct, replace or operate any eligible facility. The certificate holder shall not segment projects in order to meet the cost limitations set forth in column 2 of Table 1". This class of blanket certificate projects was established to avoid long time delays and regulatory costs on small projects that often involve maintenance or repair work. As is the case with replacement projects governed by 18 C.F.R. § 2.55, the regulations are a proper and affirmative exercise of FERC's regulatory responsibilities within the field of regulation exclusively reserved to it under the NGA and expressly not an exemption or exclusion from that authority. These types of projects are recognized by FERC as having

[4] The cost limitations are adjusted annually by FERC.

minor impacts. Such projects are often required to be accomplished expeditiously in order to maintain pipeline system reliability or to address pipeline safety concerns.

Indeed as to all NGA § 7(c) blanket certificates, FERC in 18 C.F.R. § 157.206 (b), affirmatively requires compliance with the siting requirements of 18 C.F.R. § 380.15 of its regulations and with various federal environmental laws that may be applicable to a project. These FERC regulations require that the project minimize its effects on scenic, historic, wildlife and recreational values and comply with a variety of landowner protections, pipeline safety requirements and other right-of-way precautions. The mere fact that FERC's blanket certificate regulations necessarily involve a lesser standard of siting review for small installations rather than that for large projects, does not detract from the fact that FERC has properly exercised its authority over these types of projects. That exercise of FERC authority preempts state energy siting regulation of such a project. Moreover, depending on site-specific conditions, such minor projects routinely involve consultation and permitting with state and other agencies having specific environmental review authority. Thus, any further exercise of jurisdiction by a state siting agency is not only without legal basis but is also duplicative and inefficient.

Additionally, with respect to the initial issuance of an NGA § 7(c) blanket certificate to a natural gas company, FERC conducts a hearing after notice under 18 C.F.R. § 157.208, in which all interested persons, including the EFSB and other regulatory organizations in the Commonwealth, may intervene in the proceeding, request rehearing and appeal from the Blanket Certificate order. Once the FERC order is final, however, the Commonwealth, including the EFSB, is barred under Tacoma from any collateral attack with respect to the activities that are authorized by such certificates.

Lastly, FERC has recently proposed regulations in FERC Docket No. RM03-4 entitled: Emergency Reconstruction of Interstate Natural Gas Facilities under the Natural Gas Act. The proposed regulations would authorize natural gas companies to commence immediate emergency repairs to damaged pipeline facilities, including realigning those facilities outside existing rights of way, in the event certain enumerated emergencies or

events of *force majeure* occur to the pipeline in question. Such repairs would be essential to the reliability and security of pipeline systems and may occur without advance review or approval by FERC subject to the existing environmental and other regulatory requirements of 18 C.F.R. § 157.206(d). The proposed regulations further evidence FERC's active and affirmative regulation of activities involving interstate pipeline facilities and will certainly preempt any state regulation that attempts to regulate or require the siting review of such damaged facilities.

8. Direct Sales Laterals.

In the interstate natural gas pipeline business, the term "direct sale" originally meant a sale to an end user of natural gas (owned and transported by a pipeline in its own pipeline to that end-user). Since the issuance of FERC Order 636 and the unbundling of sales and transportation services, however, interstate pipelines have not been authorized by FERC to make direct sales. DEGT and Maritimes are interstate natural gas transportation pipeline systems with no merchant function and consequently make no direct sales in the Commonwealth. Lateral pipelines of DEGT and Maritimes that transport natural gas in interstate commerce from their respective main transmission lines to end users who purchase the gas from other entities are specifically subject to FERC NGA § 7(c) certificate requirements in connection with the siting, construction and operation of those lateral pipelines. As such, EFSB regulations as applied to those lateral lines are clearly preempted by FERC regulation.

9. Fees.

DEGT and Maritimes object to any fee that the EFSB may expect them to pay with respect to EFSB energy facility siting regulations that they believe to be preempted or beyond the EFSB's statutory authority. DEGT and Maritimes remain agreeable to pay the reasonable costs of notice of public informational hearings to be conducted by the EFSB in connection with an application for any FERC NGA § 7(c) certificate that is filed with the EFSB under its existing requirements.

10. Segmentation.

With respect to interstate gas pipeline facilities that require an NGA § 7(c) certificate, FERC has regulations quoted above that prevent the segmentation of a project to avoid the possibility of a formal protest in those cases where prior notice to FERC and the public under FERC NGA § 7 (c) blanket certificates is required. See, 18 C.F.R. § 157.208. To the extent that the EFSB's proposed segmentation rule is applicable to interstate gas pipeline facilities having or requiring a certificate under NGA § 7 (c) or subject to a FERC regulation that is applicable to pipeline facilities, that rule is preempted.

11. State Policy Questionable.

Even aside from a strict federal preemption analysis and the State Jurisdictional Limitation that has been discussed above, in a time of state budget restraint the creation or application of state regulations that duplicate and may actually or potentially conflict with FERC regulation of the same subject-matter raises questions as to the advisability of the state policy that is manifested by such state regulations. It would seem as a policy matter to be a far better use of the regulatory resources of the Commonwealth for the EFSB to assert regulatory jurisdiction only over those matters that are not actively regulated by FERC and are clearly authorized under state law. DEGT and Maritimes believe that the policy manifested in the Order as applied to FERC regulated gas pipeline facilities and should be seriously reconsidered for the reasons stated herein.

12. DEGT's and Maritimes' Comments on the Four Alternative Approaches Suggested by the EFSC.

The EFSB has requested comment on four alternative approaches that the EFSB might use in connection with the siting of energy facilities in the Commonwealth by FERC regulated natural gas companies.

The first alternative is for the EFSB to continue the existing regulations as to interstate gas pipeline companies substantially unchanged. Under this approach interstate pipelines will not be required to file forecasts, but shall be required to file with the EFSB

a copy of their annual FERC Form 2 and any application for a site specific NGA § 7(c) certificate for a project located in the Commonwealth that the pipeline files with FERC. Thereafter, with respect to the NGA § 7 (c) application, the EFSB may have a public informational hearing in the affected communities regarding the proposed project in which the natural gas company participates in order to answer questions and provide information about the proposed project. The EFSB can use the hearing to collect public comment to support its intervention or participation in the project's site specific NGA § 7 (c) certificate proceeding. As noted earlier, DEGT and Maritimes believe that this process is working effectively as demonstrated by a number of interstate pipeline projects including Maritimes' Phase III and Algonquin's HubLine Projects. As to EFSB participation in NGA § 7(c) blanket certificate proceedings, nothing beyond a general authorization for the EFSB or its Staff to participate in such proceedings under FERC regulations is required. DEGT and Maritimes support the continuance of the EFSB's historic role in FERC proceedings. However, as discussed above, any affirmative regulation of such projects by the EFSB is preempted or precluded and is not authorized under the State Jurisdictional Limitation.

The second alternative that is suggested by the EFSB is that the EFSB conduct full public and adjudicatory hearings with respect to all intrastate projects and interstate projects that are to be situated in the Commonwealth. On the basis of the previous discussion, DEGT and Maritimes reiterate their position that this approach violates the State Jurisdictional Limitation and is preempted and precluded under federal law.

The third alternative suggested by the EFSB would require public, adjudicatory hearings for all intrastate and interstate pipeline projects that are proposed to be situated in the Commonwealth, except that with respect to interstate pipeline projects whose siting is subject to FERC NGA § 7(c) regulations, the EFSB will not determine the need for the project. For all the reasons that DEGT and Maritimes have discussed above, DEGT and Maritimes aver that such a regulatory approach is not authorized under the State Jurisdictional Limitation and in all events would be preempted and precluded as to any facility requiring a FERC NGA § 7 (c) certificate.

The fourth alternative requires a FERC regulated interstate pipeline company proposing to construct an interstate pipeline project situated in the Commonwealth under an NGA § 7 (c) blanket certificate to undergo informal review upon sworn testimony before the EFSB. Among other things, the subject matter of the review is to include alternative routes and environmental impacts. This EFSB proposal encounters the same legal impediments as are true of alternatives two and three. FERC has addressed these issues in its existing federal regulations. The EFSB would be attempting to regulate within the field of FERC's exclusive authority over the siting of interstate projects. Such regulation is preempted and is not authorized under the State Jurisdictional Limitation.

13. Recommended Textual Changes to the Proposed Regulations.

DEGT and Maritimes have recommendations to submit in connection with the text of the regulations that have been proposed by the EFSB. The recommended changes are shown on the version of the proposed rules that DEGT and Maritimes have attached as Exhibit A to these Comments.

The proposed changes follow directly from the arguments that DEGT and Maritimes have advanced above. As to the proposed 980 CMR 15.00 requirements, DEGT and Maritimes recommend addition of a definition for the concept "Certificate of Public Convenience and Necessity under § 7 (c) of the Natural Gas Act". The proposed definition when applied in § 15.01(3)(a) to exclude certain gas facilities from the EFSB's petition to construct requirements ensures that the EFSB will not mistakenly attempt to apply 980 CMR 15.00 requirements to natural gas company facilities that are authorized or to be authorized by FERC under an NGA § 7(c) certificate (whether site-specific or blanket) or 18 C.F.R. § 2.55 or FERC's newly proposed regulations for emergency reconstruction in Docket No. RM03-4.

As to the proposed 980 CMR 17.00 requirements, DEGT and Maritimes recommend that the definition of "Gas Project" in § 17.02 be modified to clarify that gas facilities physically located outside of the Commonwealth are not subject to such requirements. In § 17.05(1), DEGT and Maritimes recommend that the public comment requirements of the subsection be deleted as being preempted by FERC's regulations on

Blanket Prior Notice Certificates, but the companies are willing to observe a requirement that any notice of a Blanket Prior Notice Certificate that is filed with FERC be filed with the EFSB within two (2) business days of the filing of such notice with FERC. The other recommended changes for this subsection are technical, clarifying the relationship of the subsection to FERC's Blanket Prior Notice Certificate regulations. In § 17.05(2), DEGT and Maritimes recommend a simple affirmative statement that the EFSB will comply with FERC regulations on Blanket Prior Notice Certificates and protests in lieu of the language that the EFSB has proposed. In addition, DEGT and Maritimes recommend that § 17.05(3) be deleted in its entirety. The ambiguity that that sub-section creates may lead the EFSB to mistakenly apply 980 CMR 15.00 requirements to FERC regulated gas facilities.

Lastly, in § 17.06(3) and the heading to § 17.06, DEGT and Maritimes have recommended deletion of the word "other" as being unnecessarily restrictive. Moreover, if that recommendation is adopted by the EFSB, § 17.05 will be unnecessary and, except for the delivery of the notice that DEGT and Maritimes have recommended above in connection with § 17.05(1), can be deleted in its entirety.

(Signature page follows)

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